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8 **UNITED STATES DISTRICT COURT**
9 **WESTERN DISTRICT OF WASHINGTON**
10 **TACOMA DIVISION**

11 JOHN DOE #1, an individual, JOHN DOE #2,
12 an individual, and PROTECT MARRIAGE
WASHINGTON,

13 Plaintiffs,

14 vs.

15 SAM REED, in his official capacity as
16 Secretary of State of Washington, BRENDA
GALARZA, in her official capacity as Public
17 Records Officer for the Secretary of State of
Washington,

18 Defendants.

No. 3:09-CV-05456-BHS

**Request to Issue Order with Respect to the
Alternative Ground Set Forth in Plaintiffs'
Motion for Temporary Restraining Order
and Preliminary Injunction**

The Honorable Benjamin H. Settle

19
20 On July 28, 2009, Plaintiffs John Doe #1, John Doe #2, and Protect Marriage Washington
21 filed a complaint for declaratory and injunction relief, alleging that the Public Records Act is
22 unconstitutional as applied to referendum petitions, or, in the alternative, as applied to
23 Referendum 71 because there is a reasonable probability of threats, harassment, and reprisals.
24 (Dkt. 2 at 10:61-66.) On July 28, 2009, Plaintiffs submitted a motion for temporary restraining
25 order, setting forth two independent and legally sufficient grounds for the issuance of a
26 temporary restraining order and preliminary injunction. (Dkt. 3 at 9-18 (as-applied challenge to
27 the Public Records Act with respect to all referendum petitions) and 18-25 (as-applied challenge

28 **Request to Issue Order re: Alt.
Ground Set Forth in Plaintiffs' Mot.
for TRO and Prelim. Inj.
(No. 3:09-CV-05456-BHS)**

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**BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, Indiana 47807-3510
(812) 232-2434**

1 to the Public Records Act with respect to R-71 because there is a reasonable probability of
2 threats, harassment, and reprisals.) On July 29, 2009, the Court entered a temporary restraining
3 order preventing the release of the names, issued a briefing schedule with respect to the motion
4 for preliminary injunction, and scheduled a preliminary injunction hearing for September 3,
5 2009. (Dkt. 9 at 3.)

6 On September 3, 2009, the Court amended the TRO to allow Defendant Intervenor
7 Washington Families Standing Together to examine the petitions for the purpose of pursuing an
8 action pursuant to RCW 29A.72.240, but otherwise restrained the State from releasing copies of
9 referendum petitions until further order of the Court, or September 11, 2009. (Dkt. 59 at 3:1-14.)

10 On September 10, 2009, this Court issued an Order granting Plaintiffs' motion for a
11 preliminary injunction. (Docket No. 63.) ("PI Order") Importantly, for purposes of this request,
12 the Order stated:

13 Therefore, the Court concludes that Plaintiffs have established that they are likely to
14 succeed on the merits of their claim that the Public Records Act is unconstitutional as
15 applied to the disclosure of referendum petitions. At this time, the Court need not reach
16 the merits of Plaintiffs' second claim for relief.

17 (PI Order at 16:1-4.)

18 Plaintiffs now respectfully request that the Court issue an Order with respect to the second,
19 independent ground, asserted in their motion for a preliminary injunction, which asks the Court
20 to find that the Public Records Act is unconstitutional as applied to Referendum 71 because there
21 is a reasonable probability of threats, harassment, and reprisals.

22 **Events subsequent to the September 10, 2009, Order granting Plaintiffs' motion for a**
23 **preliminary injunction.**

24 On September 11, 2009, the State Defendants filed their notice of appeal. (Dkt. 65.)
25 Washington Coalition for Open Government ("WCOG") filed its notice of appeal on September
26 15, 2009. (Dkt. 67.) On September 22, 2009, the United States Court of Appeals for the Ninth
27 Circuit ("Ninth Circuit") consolidated the appeals of the State and WCOG and set an accelerated

1 briefing schedule.¹

2 On October 14, 2009, the Ninth Circuit heard oral arguments. On October 15, 2009, the
3 Ninth Circuit issued a short two paragraph order granting the Appellants' (State Defendants)
4 motion for a stay of the preliminary injunction order pending appeal, effective immediately. (Dkt.
5 97.) On October 15, Plaintiffs/Appellees filed a motion to reconsider that order in the Ninth
6 Circuit.²

7 To date, the Ninth Circuit has only stated that the Court based its order granting Plaintiffs'
8 motion for a preliminary injunction on "an incorrect legal standard." (Dkt. 97 at 3.)

9 On October 16, 2009, Plaintiffs/Appellees filed an emergency application to vacate the
10 Ninth Circuit's stay of the preliminary injunction with the Honorable Anthony M. Kennedy,
11 Associate Justice of the United States Supreme Court. On October 19, 2009, Plaintiffs motion for
12 reconsideration pending before the Ninth Circuit was denied in a one sentence order. On October
13 19, 2009, the Honorable Anthony M. Kennedy granted the application to vacate the Ninth's
14 Circuit's stay until further notice.³ (*See* Dkt. 98 ("Notice of Order").)⁴

15 **Plaintiffs respectfully request that this Court issue an order regarding the second ground**
16 **asserted in Plaintiffs' motion for a temporary restraining order and preliminary**
injunction.

17 At this time, the parties cannot know the extent of the Ninth Circuit's order. Because this
18 Court ruled only with respect to the first ground asserted in Plaintiffs' motion for a preliminary
19 injunction, (PI Order at 16:1-4), it is possible that the Ninth Circuit could remand the case back
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22 ¹ Intervenor Defendant Washington Families Standing Together filed its notice of appeal on September 28,
23 2009. (Dkt. 82.) The appeal was subsequently consolidated with the other appeals. Washington Families Standing
24 together joined in the briefing submitted by the State Defendants and WCOG and waived their right to file their own
25 merits briefing.

26 ² A true and correct copy is attached hereto as Exhibit 1.

27 ³ Pursuant to an Order from the Honorable Anthony M. Kennedy, the State Defendants and WCOG filed a
28 response on Monday, October 19, 2009. WAFST has not responded to the emergency application.

⁴ Counsel have been informed that the Honorable Anthony M. Kennedy has referred the matter to his
colleagues. This does not currently affect the Order issued by Justice Kennedy.

1 to this Court with instructions to enter an order with respect to the second claim.⁵ To avoid any
2 undue delay, Plaintiffs believe it would be prudent for this Court to enter an order with respect to
3 the second ground as soon as possible. The issue has been fully briefed and was properly before
4 the Court at the September 3, 2009 hearing. (*See* Dkt. 3 at 18-25 (Pls.' Prelim. Inj. Memo.); Dkt.
5 25 at 11-15 (Defs.' Opp'n); Dkt. 31 at 8-12 (Pls.' Reply).)

6 In the event that this Court determines that there is a reasonable probability that the
7 disclosure of the Referendum 71 petitions will result in threats, harassment, and reprisals, it will
8 constitute an independent ground for a preliminary injunction. If the Ninth Circuit opinion does
9 not address this ground, the preliminary injunction would remain in effect and protect Plaintiffs
10 from immediate and irreparable harm to their First Amendment rights. In the event that the Ninth
11 Circuit opinion does address the second ground, an appropriate motion to alter or vacate the
12 order could be made pursuant to Federal Rule of Civil Procedure 60(a)(5).

13 Therefore, to prevent any undue delay, Plaintiffs respectfully request that this Court enter an
14 Order with respect to second claim asserted in Plaintiffs' motion for preliminary injunction.

15 Dated this 20th day of October, 2009.

16 Respectfully submitted,

17 /s Sarah E. Troupis

18 James Bopp, Jr. (Ind. Bar No. 2838-84)*
19 Sarah E. Troupis (Wis. Bar No. 1061515)*
20 Scott F. Bieniek (Ill. Bar No. 6295901)*
21 BOPP, COLESON & BOSTROM
22 1 South Sixth Street
23 Terre Haute, Indiana 47807-3510
24 (812) 232-2434
25 *Counsel for All Plaintiffs*

Stephen Pidgeon
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, Washington 98201
(360) 805-6677
Counsel for All Plaintiffs

26 *Pro Hac Vice Application Granted

27 ⁵ See 28 U.S.C. § 1292(a)(1) (“[T]he courts of appeals shall have jurisdiction of appeals from interlocutory
28 orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving
injunctions . . .”). Because this Court did not enter an Order with respect to the second claim asserted in Plaintiffs’
motion for a preliminary injunction, it is possible that the Ninth Circuit may find that it does not have jurisdiction to
enter an order with respect to that ground, and that the case must be remanded to this Court for such an Order.

1 **CERTIFICATE OF SERVICE**

2 I, Sarah E. Troupis, am over the age of 18 years and not a party to the above-captioned
3 action. My business address is 1 South Sixth Street; Terre Haute, Indiana 47807-3510.

4 On October 20, 2009, I electronically filed the foregoing document described as Request to
5 Issue Order with Respect to the Alternative Ground Set Forth in Plaintiffs' Motion for
6 Temporary Restraining Order and Preliminary Injunction with the Clerk of Court using the
7 CM/ECF system which will send notification of such filing to:

8 James K. Pharris
9 jamesp@atg.wa.gov
Counsel for Defendants Sam Reed and Brenda Galarza

10 Steven J. Dixon
11 sjd@wkdtlaw.com
12 Duane M. Swinton
13 dms@wkdtlaw.com
14 Leslie R. Weatherhead
15 lwlibertas@aol.com
Counsel for Intervenor Washington Coalition for Open Government

16 Ryan McBrayer
17 rmcbrayer@perkinscoie.com
18 Kevin J. Hamilton
19 khamilton@perkinscoie.com
20 William B. Stafford
21 wstafford@perkinscoie.com
Counsel for Intervenor Washington Families Standing Together

22 I declare under the penalty of perjury under the laws of the State of Indiana that the above is
23 true and correct. Executed this 20th day of October, 2009.

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